

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VS.

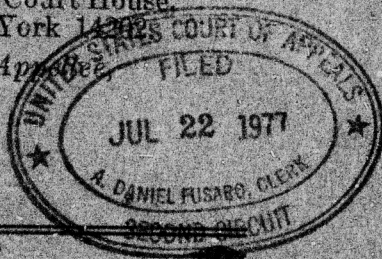
ANTHONY JAMES SEBASTIAN
and PATRICK GIBBONS,
Defendants-Appellants.

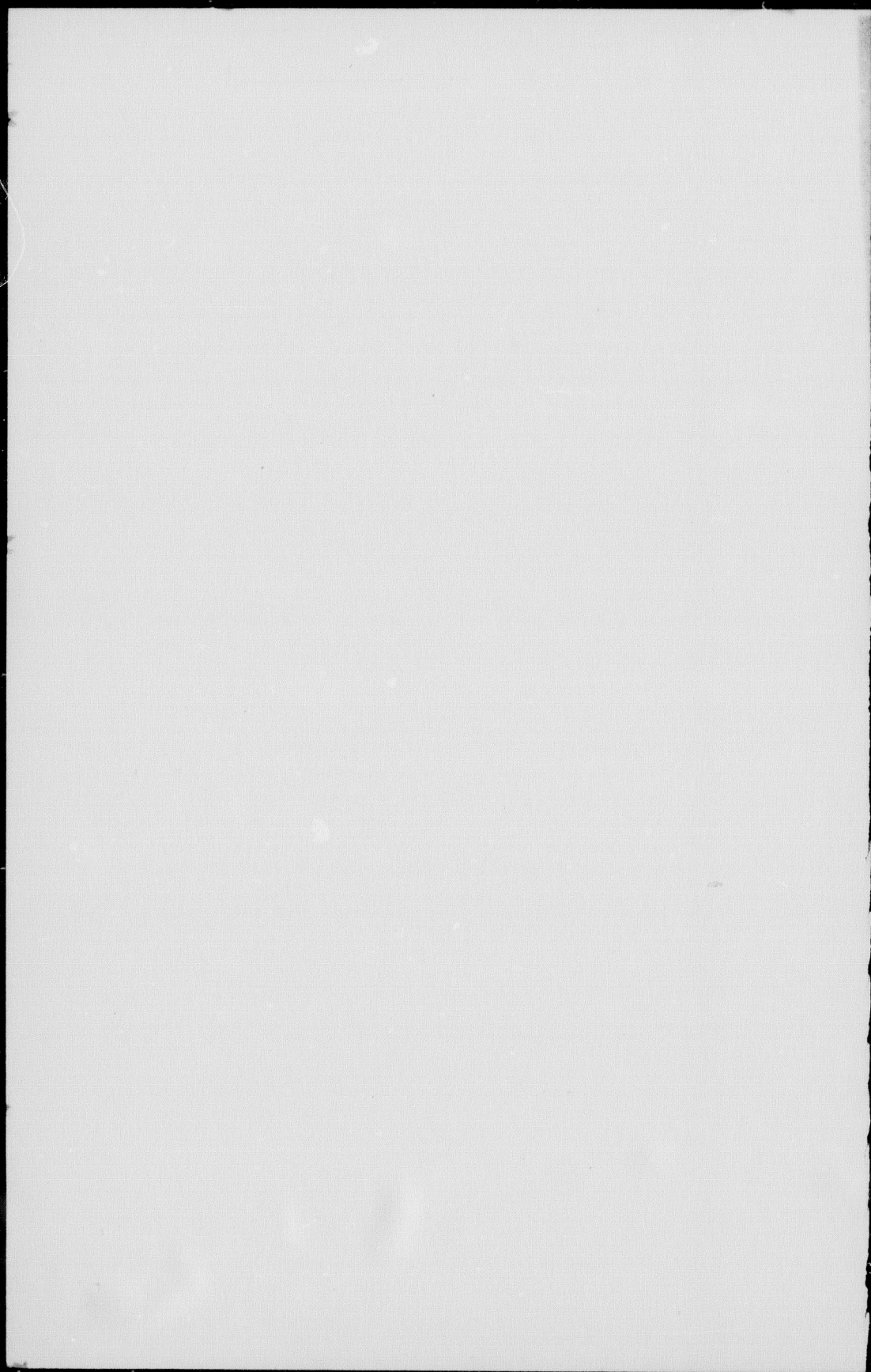
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE

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18 U.S.C.:

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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-8174

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ANTHONY JAMES SEBASTIAN and
PATRICK GIBBONS,
Defendants-Appellants.

BRIEF OF APPELLEE

Preliminary Statement

On June 21, 1973, a three count indictment was filed with the Clerk of the Court charging Anthony James Sebastian and Patrick Gibbons with two counts of passing and uttering or "putting forth" obligations of the United States in violation of 18 U.S.C. 472 and one count of conspiring to do the same in violation 18 U.S.C. 371 (App. 12-14)¹.

As a consequence of the court's suppression of certain evidence based upon the Government's failure to turn over prior statements of prosecution witnesses at a suppression hearing, this matter has been previously before this court. *United States v. Sebastian and Gibbons*, 497 F.2d 1267 (2nd Cir., 1974). This court reversed.

¹ Reference to Appendix.

Following additional pre-trial proceedings, that indictment was reached for trial on May 4, 1976, at which time a jury was selected (App. 19). The jury was sworn and proof was scheduled to commence on May 7, 1976. On that date, prior to the taking of any proof, the Government moved to dismiss that indictment on the theory that uttering and publishing or "putting forth" as true, genuine United States Savings Bonds containing a forged endorsement did not constitute a violation of 472 (App. 26). Importantly, counsel for Sebastian and Gibbons joined in the motion stating that: "... a motion to dismiss the indictment at the conclusion of the Government's case would have to be granted" (App. 27). Judge Curtin agreed and terminated the proceedings (App. 28).

On May 24, 1976, these defendants were indicted on thirty-six counts of aiding and abetting another to unlawfully forge the endorsement of Bernice Goulder, the owner of the bonds in violation of 18 U.S.C. 495 and for conspiring to do those acts in violation of 18 U.S.C. 371 (App. 15-17).²

On September 28, 1976, the defendants moved to dismiss this indictment on the ground that double jeopardy precluded their trial. Following briefing and oral argument, the District Court Judge, Hon. John T. Curtin, filed his Decision and Order denying the defendants' motion to dismiss on that ground (App. 1-11) as well as denying their motion to dismiss for lack of speedy trial which is not at issue here.³ This appeal challenges that Decision and Order.

² 18 U.S.C. 472 and 495 are fully set forth at pp. 2-3 of the Appellants' Brief.

³ This court previously dismissed that aspect of this appeal as a non-final, non-appealable order. Clearly, the double jeopardy aspect is appealable. *Abney v. United States*, U.S., 45 U.S.L.W. 4594 (Decided June 9, 1977).

Statement of Facts

Since there was never any taking of proof when the first indictment was reached for trial, there are no "facts" as such. Clearly, the second indictment stems from the same "acts or transactions" that resulted in the first indictment, nevertheless, the evidence required to sustain a conviction under the present indictment, at least as to the substantive counts, is disparate from the first for the first indictment charged "putting forth" while the present indictment charges "falsely endorsing."

ARGUMENT

Trial of These Defendants is Not Barred

A. Without reaching a determination as to whether or not the present indictment charges a different offense, the termination of the proceedings under the first indictment was such that proceeding under the present indictment is not barred.

Unquestionably, once the first indictment was reached for trial, the jury impanelled and sworn, jeopardy attached. However, as this court as so often said, that merely begins rather than ends the inquiry as to whether or not trial on the present indictment is barred. The first inquiry must be the extent to which the Double Jeopardy Clause protects the interests of a defendant.

Clearly a defendant is protected against a second prosecution for the same offense after *acquittal*, a second prosecution for the same offense after conviction, multiple punishment for the same offense and, under appropriate cir-

cumstances, attempts to relitigate facts underlying a prior acquittal (collateral estoppel). See *Brown v. Ohio*, U.S., 45 U.S.L.W. 4697, 4699 (Decided June 16, 1977). Certainly, the present prosecution can not be barred based upon the *Ashe v. Swenson*, 397 U.S. 436 (1970) doctrine of collateral estoppel, for there was never any litigation of the facts under the first indictment. *Brown v. Ohio*, *supra*, at 4699 n.6. Nor is there a question here of multiple punishment for the same offense or a second prosecution for same offense after conviction. Only two questions are left: (1) whether or not requiring these defendants to stand trial on the present indictment constitutes a second prosecution for the same offense after acquittal. *United States v. Wilson*, 420 U.S. 332 (1974); and (2) whether or not termination of the first proceedings deprived these defendants of their right to have their trial completed by the jury selected under the first indictment. *United States v. Jorn*, 400 U.S. 470 (1970).

The termination of the first proceeding was not an acquittal. While the Government recognizes the merit of the argument of Sebastian and Gibbons that the termination was tantamount to an acquittal, there are persuasive reasons why Judge Curtin below found *Illinois v. Sommerville*, 410 U.S. 458 (1973) controlling.⁴ Both the prosecutor, the defendants and Judge Curtin, rightly or wrongly, acted on May 7, 1976, upon the theory that the old indictment was invalid. The prosecutor stated that that was his view (App. 26); the defendants agreed, stating that even if there were a conviction it would be subject to a motion to dismiss and joined in the motion (App. 27); and the court agreed (App. 7-9). And there is certainly

⁴ *Sommerville* was recently followed by the Supreme Court in *Lee v. United States*, U.S., 45 U.S.L.W. 4661 (Decided June 13, 1977).

authority for that view. *Roberts v. United States*, 331 F.2d 502 (9th Cir., 1964) held that passing and uttering an otherwise genuine United States Savings Bond with a forged endorsement does not constitute a crime under 472. The defendants have cited not one case dealing with a prosecution of a crime of "uttering and publishing" as true, a genuine instrument under 472. The defendants, nevertheless, urge that the crime of "uttering and publishing" a forged genuine instrument is a valid 472 charge. However, all the cases cited by them wherein convictions were upheld for "uttering and publishing" forged genuine instruments are all cases under 495 (Appellants' Brief, pp. 15-20).

The standard for determining whether termination of a prior proceeding constitutes an acquittal is set forth in *United States v. Wilson*, *supra*, and *United States v. Martin Linen*, 97 S.Ct. 1349. The Supreme Court there said that an acquittal represents: "... a resolution, correct or not, of some or all of the factual elements of the offense charged." Here, there was no resolution of any of the factual elements occasioned by the fact that no proof was taken. Hence, there could be no acquittal.

As indicated above, the only other question is whether or not the termination of the prior proceedings constituted a mistrial not joined in by these defendants. As the record indicates (App. 27), the defendants joined in the motion so that they cannot claim that they lost their valued right to have their case decided by the first tribunal. See *United States v. Jorn*, *supra*, and *United States v. Dinitz*, 424 U.S. 600 (1975). Nor was this a mistrial occasioned by the "bad-faith" conduct by the prosecutor or judge such as to bar further proceedings on the same offense. *United States v. Dinitz*, 424 U.S. at 611. See also *Lee v. United States*, *supra*.

In any event, the present indictment does not charge these defendants with "uttering and publishing" in violation of 495. It charges them with "falsely endorsing" or, more specifically, aiding and abetting another to "falsely endorse" in violation of 495. This leads to the Government's next argument that the offenses charged in the present indictment are not the same in law and fact as those charged in the original indictment and that, consequently, trial on the present indictment is not barred.

B. The substantive offenses charged in the present indictment are not "the same in law and fact" as those charged in the first.

Although the court below did not find a bar to further proceedings on the conspiracy count of the present indictment, the Government is prepared to concede that it is barred from trying these defendants on that conspiracy count. The gist of conspiracy is an agreement and while the agreement in the first indictment is to utter and publish savings bonds knowing them to be forged, whereas the agreement in the second indictment is to falsely endorse the bonds, proof of the conspiracy under the first indictment would probably be sufficient to make out a *prima facie* case of agreement under the present indictment. Both this court and the Supreme Court have issued recurring criticisms of the "same evidence" test when applied to conspiracies, *United States v. Bommarito*, 524 F.2d 140 (2nd Cir., 1975); *United States v. Mallah*, 503 F.2d 971 (2nd Cir., 1974), *cert. denied*, 420 U.S. 995 (1975); *United States v. Cioffi*, 487 F.2d 492, 497 (2nd Cir., 1973); *United States v. Sperling*, F.2d (2nd Cir., Decided June 13, 1977), Slip. op. 4139; *Abbate v. United States*, 359 U.S. 187 (1959); *Jeffers v. United States*, U.S., 45 U.S.L.W. 4691 (Decided June 16, 1977).

However, in applying the "same evidence" test to the substantive counts, further proceedings under the present indictment are not barred. Despite urgings by the defendants to the contrary, the *Blockburger*⁵ "same evidence" test is very much alive today. *Brown v. Ohio*, *supra*; *Jeffers v. United States*, *supra*. Under the first indictment it would have been incumbent upon the Government to prove a "putting forth", an element not required under the second indictment, whereas under the second, it is incumbent upon the Government to show that the defendants, "falsely endorsed" or, more specifically, to show that the defendants aided and abetted another in "falsely endorsing" and no proof that the defendants "put forth" the forged documents.

In *United States v. Maybury*, 274 F.2d 899 (2nd Cir., 1970), the court discussed the differences between the uttering and forgery paragraphs of 495 and held that placing the defendant in jeopardy under an indictment for forgery alone would not have barred a subsequent prosecution for uttering. The court's rationale for its holding, that the essential elements of the two crimes differ, applies equally well to the instant situation in which the defendants are first placed in jeopardy under an indictment for uttering, and then later prosecuted for forgery. The *Maybury* court was dealing with indictments under the same statutory section, namely, 495, and found distinct differences in the proof of two separate offenses under that section. The differences in the elements of proof are even greater between the 472 offense and the forgery of an endorsement under 495. Further, the fact that 472 and 495 were enacted as separate sections on the same day and with different penalties evinces the intent of Congress that these sections were not meant to cover the same offense.

⁵ *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

In short, the elements of the substantive offenses charged in the two indictments are different and the facts required to support each are different. See *United States v. Kramer*, 289 F.2d 909, 913 (2nd Cir., 1961); *United States v. Mallah*, *supra*; *United States v. Calla*, 521 F.2d 605 (2nd Cir., 1975). It is clear then, that a conviction for passing and uttering under 472 does not bar a trial for the offense of forgery under 495, nor would a conviction for uttering under 495 prevent a subsequent trial for forgery under that section.

While Justice Brennan did speak for a "same transaction" test in *Abbate v. United States*, 359 U.S. 187, 196 (1959), that test, although coming close, did not carry the day in *United States v. Sabella*, 272 F.2d 206 (2nd Cir., 1957) as the defendants urge. As this court said in *United States v. Cioffi*, *supra*, at 497, *Sabella* simply refused to extend the "same evidence" test as originally set down in *Morey v. Commonwealth*, 108 Mass. 433 (1871) to a point of rigid formality. This court has also recently affirmed that test in *United States v. Sperling*, *supra*, as has the Supreme Court in its very recent pronouncements in *Jeffers v. United States*, *supra*, and *Brown v. Ohio*, *supra*.

The "same evidence" test is not only used in federal courts, but is the most commonly used test among all the several jurisdictions of the United States. The Model Penal Code also adopts the same evidence test (American Law Institute Model Penal Code, Section 1.09 Proposed Official Draft, 1962). While it may be more harsh than the "same transaction" test, that is alleviated by the collateral estoppel doctrine, *Ashe v. Swenson*, *supra*, and the lesser included offense doctrine, *Brown v. Ohio*, *supra*.

The same evidence may be probative of more than one violation of the law. To introduce it into evidence during trial

on different offenses is entirely consistent with the principles of double jeopardy. *United States v. Papa*, 533 F.2d 815 (2nd Cir., 1976), *cert. denied*, 97 S.Ct. 387 (1976). The question is not what evidence will be used at trial, but what evidence is required to convict under the two statutes. *United States v. Barket*, 530 F.2d 181 (8th Cir., 1975).

In summary, to support a former jeopardy claim the defendants must show that the offenses charged were in law and in fact the same. *United States v. McCall*, 489 F.2d 359, 362 (2nd Cir., 1973), *cert. denied*, 419 U.S. 849; *United States v. Pacelli*, 470 F.2d 67, 72 (2nd Cir., 1972), *cert. denied*, 410 U.S. 983 (1973). This they have not done. Unless " 'The evidence required to support a conviction upon one indictment would have been sufficient to warrant a conviction upon the other,' the double jeopardy defense must fail." *United States v. Cioffi*, *supra*, at 496, quoting from *Morey v. Commonwealth*, *supra*, at 434. Lastly, prosecution for multiple statutory violations arising out of a single transaction is permissible and each violation may be tried separately. *United States v. Nathan*, 476 F.2d 456, 459 (2nd Cir., 1973) *cert. denied*, 414 U.S. 823; *United States v. Calla*, *supra*, at 607.

Conclusion

For all the reasons stated above, it is respectfully submitted that Judge Curtin's Decision and Order be affirmed, at least in so far as it denies the defendants former jeopardy claim as to the substantive counts.

Respectfully submitted,

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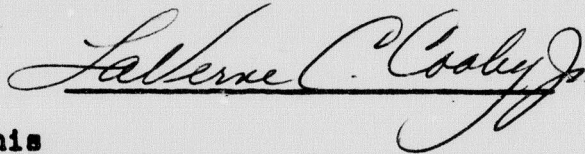
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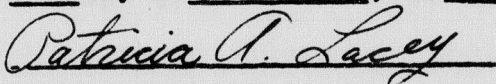
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